UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
OBED ARTHUR KALWITZ, JR. and	)	CASE NO. 99-34758 HCD
ROLENE MAE KALWITZ,	)	CHAPTER 12
	)	
DEBTORS.	)	

Appearances:

R. William Jonas, Jr., Esq., attorney for Debtors, Hammerschmidt, Amaral & Jonas, 137 N. Michigan Street, South Bend, Indiana 46601;

Joseph D. Bradley, Esq., attorney for Creditors, 105 East Jefferson Boulevard, Suite 512, South Bend, Indiana 46601; and

Paul R. Chael, Esq., Standing Chapter 12 Trustee, 401 West 84th Drive, Suite C, Merrillville, Indiana 46410.

MEMORANDUM OF DECISION

At South Bend, Indiana, on April 28, 2005.

On February 28, 2005, the court granted the Chapter 12 Trustee's Motion to Dismiss. It dismissed the chapter 12 petition of the Debtors Obed Arthur Kalwitz, Jr., and Rolene Mae Kalwitz ("Debtors") without prejudice. *See* R. 266. Before the court is the Debtors' Motion to Reconsider Order Granting Trustee's Motion to Dismiss, filed by the Debtors on March 1, 2005. *See* R. 267. On March 10, 2005, the Response to Debtors' Motion to Reconsider Order of Dismissal of Case was filed by Eugene D. Kalwitz, individually, and Sharon K. Grieger and Eugene D. Kalwitz, as Personal Representatives of the decedents' estates of Obed Kalwitz, Sr. and Helen Kalwitz ("Creditors"). *See* R. 273. A hearing on the Motion to Reconsider and Response was held on March 17, 2005. Following the hearing, the court took the matter under advisement. For the reasons that follow, the Debtors' Motion to Reconsider is denied.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(A) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rule of Bankruptcy Procedure 7052. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

The Debtors initiated this chapter 12 case on December 17, 1999. On December 28, 2004, the Standing Chapter 12 Trustee filed a Motion to Dismiss the case for unreasonable delay pursuant to 11 U.S.C. § 1208(c). The Trustee stated that the case had been pending for more than five years and that the Debtors had failed to obtain confirmation of a plan of reorganization. Because it appeared to the Trustee that reorganization by the Debtors was not likely, and because their continued existence in chapter 12 would cause further delay to the Debtors' creditors, he sought dismissal of the chapter 12 proceeding.

The Debtors filed their Objection on February 17, 2005. They contended that their inability to obtain confirmation of a plan was caused by the ongoing litigation in state probate court over land claimed by the Debtors ("probate property"). In their opinion, the amount of funds available under a plan, as well as the length of a plan, depended on the result of that dispute. Once the court action seeking turnover of that probate property from the decedents' estates was resolved, the Debtors assured the court, the plan could be filed.

The court conducted a hearing on the motion and objection on February 24, 2005. The Chapter 12 Trustee acknowledged that property disputes before the probate court affected the Debtors in this court.

Nevertheless, he stated, after five years, when a chapter 12 bankruptcy case should be concluded, the Debtors' plan was not even ready to be confirmed. The Trustee admitted that creditors had inquired about the bankruptcy from time to time but had not complained to him. However, he urged that dismissal was warranted.

Counsel for the Debtors explained that the administration of the probate estate had not been completed. In his view, partition of the probate property was the proper course; the Debtors would be able to present a 100% repayment plan once they got control of those assets. He underscored, however, that it was not possible to effect a plan without that property. Debtors' counsel also insisted that both the Debtors and the Creditors shared the responsibility for creating the voluminous amount of litigation in this case. Nevertheless, he opined, when the probate property was partitioned, the Debtors could satisfy their creditors and accomplish the reorganization.

Counsel for the Creditors agreed that partition and turnover of the property were necessary before a plan could go forward, but asserted that those state law matters should be determined in the state probate court, not in the bankruptcy court. Counsel reminded the court that the United States District Court, in affirming this court's judgment in this case more than four years ago, determined that the bankruptcy court could not order the turnover of the probate property until all administrative expenses were satisfied.[1] He informed the court that the

---

[1] The record in this case reflects that the Debtors had filed a motion for turnover of property of the estate on April 5, 2000. *See* R. 58. The property at issue had been bequeathed equally to the debtor Obed Jr. and his brother Eugene. Because of disagreements among the beneficiaries of the parents' wills, the LaPorte Circuit Court appointed a receiver to administer the farmland. The receiver had managed the farm for three years prior to the filing of the Debtors' bankruptcy petition. The Debtors sought the turnover of Obed's interest in the farmland. After a two-day hearing, this court determined that the debtor's equitable half-interest was property of the Debtors' estate subject to turnover. However, it further found that the receiver should be excused from turning over the property and should continue to control it because it was in the best interests of the creditors. The court therefore denied the Debtors' motion for turnover. *See* Judgment, Memorandum of Decision, April 21, 2000. The United States District Court affirmed that determination on December 21, 2000. It held:

> In light of the following, the bankruptcy court cannot order the custodian to turn over the proceeds until all the administrative expenses are satisfied. Both parties concede that a contentious administration of the parents' estates is still pending in the LaPorte County Circuit Court. The debtors' and [Decedents' Estates'] disagreements have already led to litigation in the administration of these estates. Thus, it is in

(continued...)

administrative expenses of the probate court still had not been paid. Since the bankruptcy case could not progress, he urged, it was inappropriate to direct turnover at this time. The Creditors agreed with the Trustee that the case should be dismissed.

In response, the Debtors argued that they had no control over the probate proceeding and instead wanted the bankruptcy court to order the turnover of the probate property for use in their bankruptcy. The Creditors replied that, pursuant to the district court order, the bankruptcy court did not have the authority to order turnover of the probate property. Moreover, they argued, the Debtors were parties to the probate proceeding, which was the most effective forum for resolving the property issues. After five years without a confirmable plan, they contended, the Debtors should not be allowed to continue in bankruptcy.

After hearing the arguments, the court determined that the Debtors' chapter 12 case should be dismissed. It reasoned that the bankruptcy court could not give the relief the Debtors sought until the Debtors could formulate a plan. However, the Debtors had stated that they could not propose a plan until the probate proceedings were resolved. The court agreed with the Trustee and the Creditors that the proper forum for decision-making at present was the probate court in LaPorte County, Indiana. It suggested that, once the probate process had been concluded, then if the Debtors were to file another bankruptcy petition, the court would entertain a plan. Nevertheless, the court stated, five years was certainly enough time to present a confirmable plan, and the Debtors did not accomplish that. The court, having considered the positions of the parties in light of the record before it, granted the Trustee's motion to dismiss and ordered that the chapter 12 petition of Obed Arthur Kalwitz, Jr. and Rolene Mae Kalwitz be dismissed without prejudice.

---

[1](...continued)

> the best interests of all parties involved that the cash proceeds remain in the control of the custodian pending the determination of the administration expenses by the probate court. The bankruptcy court's refusal to turn over one half of the proceeds from the property was not an abuse of discretion.

Kalwitz v. Estate of Kalwitz, Memorandum and Order of December 21, 2000, Civil No. 3:00 cv 572AS, at 10-11.

On March 1, 2005, the Debtors filed their motion to reconsider the court's order pursuant to Bankruptcy Rule 9024. They asserted that the dismissal was erroneous because the Trustee failed to establish unreasonable delay "that is prejudicial to creditors," as required by § 1208(c)(1). Moreover, they claimed, the Trustee had admitted that there had been no prejudice to creditors from the delay in confirmation of the chapter 12 plan. They raised three other points. First, they reiterated that they had no control over the completion of the probate proceeding and thus sought turnover of the probate property in the bankruptcy court. Second, they argued that they needed the protection of the automatic stay to prevent the loss of other farm land. Finally, they suggested that dismissal of this case would have the practical effect of barring the Debtors from future relief, because their attorney would be a creditor in a future bankruptcy and could not serve as their future counsel. The Debtors asked the court to reconsider its Order granting the Trustee's motion to dismiss.

The Creditors responded that the Trustee had stated only that he had not been contacted by creditors complaining of unreasonable delay or prejudice from such delay. They noted, as well, that the representations of the Debtors themselves supported the Trustee's motion: The Debtors stated that they could not formulate a feasible chapter 12 plan until the probate property in which they held an interest was part of their bankruptcy estate. The Creditors contended that the partition of the property would be accomplished under Indiana law in the pending state court probate proceeding, rather than in a bankruptcy adversary proceeding. Moreover, because the probate property issues were numerous, complex, and contentious, the Debtors would not be able to formulate a confirmable chapter 12 plan in the foreseeable future. The circumstances supported the Trustee's contention that continuation of the case, after five years without a confirmed plan, would cause unreasonable delay that was prejudicial to creditors. The Creditors asked the court to deny and overrule the Debtors' motion to reconsider.

Discussion

At the outset, the court notes that the Debtors' Motion to Reconsider was filed within ten days after entry of the order of the court dismissing the Debtors' chapter 12 case. It therefore construes the motion for

reconsideration to be a motion to alter or amend a judgment pursuant to Federal Rule of Bankruptcy Procedure 9023, which applies Federal Rule of Civil Procedure 59(e) in bankruptcy cases. *See* Fed. R. Civ. P. 59(e) ("Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment."); *see also In re DeLaughter*, 295 B.R. 317, 319 (Bankr. N.D. Ind. 2003).

> Although both Rules 59(e) and 60(b) have similar goals of erasing the finality of a judgment and permitting further proceedings, Rule 59(e) generally requires a lower threshold of proof than does Rule 60(b). Instead of the exceptional circumstances required to prevail under Rule 60(b), Rule 59(e) requires that the moving party clearly establish a manifest error of law or an intervening change in the controlling law or present newly discovered evidence.

Romo v. Gulf Stream Coach, Inc., 250 F.3d 1119, 1121 n.3 (7th Cir. 2001) (citations omitted). The burden is on the party seeking reconsideration to demonstrate the existence of manifest errors of fact or law.[2] Primarily because the court made its ruling in open court, it now revisits the determination to see if substantial reason, in the form of a manifest error of law or fact, exists for reconsidering it.

It is clear and well understood that a debtor's filing for bankruptcy protection under chapter 12 "without the ability to reorganize renders the petition subject to dismissal." *In re Weber*, 297 B.R. 567, 572 (Bankr. N.D. Iowa 2003) (citing *Euerle Farms, Inc. v. State Bank in Eden Valley (In re Euerle Farms, Inc).*, 861 F.2d 1089, 1092 (8th Cir. 1988)). It is within the discretion of this court to dismiss a debtor's case. *See Michels v. Maynard Savings Bank (In re Michels)*, 305 B.R. 868, 872 (8th Cir. B.A.P. 2004). Pursuant to 11 U.S.C. § 1208(c), "[o]n request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including – (1) unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors."[3] Section 1208(c) enumerates nine reasons for dismissal, but that list is not

---

[2] The Debtors' motion to reconsider was filed under Bankruptcy Rule 9024, which applies Rule 60(b), rather than 9023, which applies Rule 59(e). The Seventh Circuit has commented that, "[i]f a litigant wants the benefit of whatever lower threshold of proof Rule 59(e) may offer, it behooves him to indicate that his motion is under Rule 59(e)." *Romo*, 250 F.3d at 1121 (citing *Ball v. City of Chicago*, 2 F.3d 752, 760 (7th Cir. 1993)).

[3] Because this chapter 12 dismissal provision is identical to § 1307(c), the dismissal section in chapter 13 cases, courts look at the same factors when analyzing the propriety of dismissal in either the chapter 12 or chapter 13 context. *See In re Burger*, 254 B.R. 692, 696 (Bankr. S.D. Ohio 2000).

exclusive. *See In re Michels*, 301 B.R. 9, 18 (Bankr. N.D. Iowa 2003). A court may consider "a multiplicity of factors . . . in the aggregate" when weighing whether dismissal is proper under § 1208(c). *In re Euerle Farms, Inc.*, 861 F.2d at 1091; *see also In re French*, 139 B.R. 476, 483 (Bankr. D.S.D. 1992) (stating that unreasonable delay can be found in the failure to file timely documents, a confirmable plan, a modified plan, or an extension request). In this case, the court granted dismissal under § 1208(c)(1), which has three components: (a) delay that was unreasonable, (b) delay that was caused by the debtor, and (c) delay that was prejudicial to creditors. According to the Debtors, the third prong was not proven and therefore the dismissal was erroneous.

> The Trustee's Motion to Dismiss presented the following grounds for dismissal:
>
> 1. That this case has been pending for more than five (5) years and the Debtors have failed to obtain confirmation of a Plan of reorganization.
>
> 2. That it appears that reorganization by these Debtors is not likely and continued existence in chapter 12 is only going to cause further delay to the Debtors' creditors.

R. 258. At the hearing, the Trustee clarified that he sought dismissal under § 1208(c)(1) for unreasonable delay by the debtor. The judge, noticing that the motion did not allege prejudice to the creditors, asked the Trustee if any creditors had contacted him with complaints. The Trustee replied, "Not really, your honor, I have had some inquiries along the way but I don't think I've had any specific complaints from creditors." He emphasized, however, that the Plan proposed five years ago was not feasible and that he had no confidence that the Debtors could offer a plan that was confirmable in light of the problems with the probate property. At the conclusion of the hearing, after asking questions of the parties and considering their positions, the court was satisfied that there was sufficient evidence of cause to dismiss the Debtors' case for unreasonable delay by the Debtors that was prejudicial to their creditors.

The Debtors have asked the court to reconsider that determination on the ground that no creditors complained to the Trustee and thus that the Debtors' delay in proposing a confirmable plan was not prejudicial to creditors. However, it was clear to the court at the hearing, after a full review of the record, that the Creditors,

who are the personal representatives of the decedents' estates, had expressed their dissatisfaction there at the hearing and in the legal battles that had continued throughout the case. Moreover, although Debtors' counsel named three creditors whose claims have been satisfied or who appear to be receiving payments,[4] there are at least six other creditors who have filed proofs of claim in this case and whose claims have not been addressed. For five years the Debtors have enjoyed the protection of the automatic stay and have had the use of their assets while some creditors have received no payments. Creditors should not be penalized because they waited without complaint while the family's feuding over their parents' estate continued. In the view of this court, the Debtors' conduct in not proposing a confirmable plan in more than five years has delayed their creditors in the collection of their debts to their prejudice. *See, e.g., In re Rusher*, 283 B.R. 544, 546-47 (Bankr. W.D. Mo. 2002) (finding that the debtor's behavior, in filing three cases in three years, was prejudicial to her creditors and that cause existed to dismiss the case). Cause has been found to dismiss a case when a debtor proposes "a problematic and unconfirmable plan from which payment of creditors was conjectural at best." *In re Euerle Farms*, 861 F.2d at 1092; *see also In re Weber*, 297 B.R. at 572-73 (finding that the failure to propose a confirmable plan, after filing more than four plans in twelve months, created an unreasonable delay); *In re Rosencranz*, 193 B.R. 629, 637 (Bankr. D. Mass. 1996) (finding that debtor filed an unconfirmable plan, that delays prejudiced the unpaid creditors, and that dismissal was proper). The court was satisfied that these Debtors' creditors were prejudiced by the Debtors' delay in presenting a confirmable plan.

The court also found that the creditors were prejudiced by the Debtors' admitted inability to reorganize without the probate property. *See In re Weber*, 297 B.R. at 573 (finding that the debtors' inability to reorganize with their own income, along with their probable inability to propose a confirmable plan, further prejudiced the creditors). In recognition of the acrimonious probate litigation ongoing between the Debtors and Creditors during this bankruptcy proceeding, the court has awaited some resolution in the probate court. *See, e.g.*,

---

[4] Debtors' counsel stated at the hearing that three creditors – the Ina Tofte estate, Metropolitan Life Insurance Company, and Rick Gikas, Esq. – had their claims compromised or were being paid appropriately.

In re French, 139 B.R. at 484 (noting that "the apparent acrimony between Debtor and his wife has fueled a seemingly endless divorce" and that delay was caused by both parties). However, a chapter 12 bankruptcy was structured to require speedy confirmations of plans; as the court stated at the hearing on the Trustee's Motion to Dismiss, five years is quite enough time to allow the Debtors to have a plan confirmed.

> Chapter 12 is designed to provide a relatively expedited resolution of a family farmer's disputes with its creditors. Cause exists for dismissal where Chapter 12 debtors have had ample opportunity to propose a confirmable plan and have failed to do so.

In re Weber, 297 B.R. at 571 (citing *Barger v. Hayes Cty. Non-stock Co-op (In re Barger)*, 233 B.R. 80, 85 (8th Cir. B.A.P. 1999); *In re Luchenbill*, 112 B.R. 204, 219 (Bankr. E.D. Mich. 1990)).

It is noteworthy that the Debtors have not challenged the court's finding that the five-year delay in presenting a confirmable plan was unreasonable. Although courts are reluctant to declare that a specific period of delay is *per se* unreasonable, one district court found that the debtors' three-year delay in presenting a confirmable plan was "unreasonable as a matter of law." *In re Suthers*, 173 B.R. 570, 573 (W.D. Va. 1994). Courts have examined the circumstances of the debtors before them in determining whether the delay was reasonable. *See, e.g.*, *In re Suthers*, 173 B.R. at 573 (reversing bankruptcy court's denial of motion to dismiss, finding that the case had "floundered" for three years and that the debtors "enjoyed the protection of the automatic stay while creditors watched the value of the estate dwindle"); *In re Michels*, 305 B.R. at 873 (affirming dismissal, concluding that debtor, after more than two years of filing unsuccessful plans, had had a sufficient opportunity to confirm a plan). In fact, one bankruptcy court granted dismissal even after finding expressly that the creditors generally had not been prejudiced; it based the dismissal on the court's denial of confirmation of five plans in 13 months, the unreasonable delay in the case, lack of good faith, and other factors. *See In re Luchenbill*, 112 B.R. at 219 (finding that, after 5 plans in 13 months, the debtors "had long enough to attempt [reorganization]").

This court, after reviewing the record herein, observing the debtors' conduct over five years, and considering the totality of the circumstances, found that "a multiplicity of factors . . . in the aggregate" could justify

the dismissal of this case. *In re Euerle Farms, Inc.*, 861 F.2d at 1091. First, there were procedural mistakes that could have triggered dismissal. A chapter 12 debtor is required to file a plan not later than 90 days after the order for relief unless an extension is requested and substantially justified. *See* § 1221. The period for filing the Kalwitz plan expired on March 16, 2000. On that date, neither a plan nor a request for extension of time was on file. The Plan was untimely filed thirteen days past the bar date. That conduct was a ground for dismissal. *See* § 1208(c)(3); *see also In re Braxton*, 121 B.R. 632, 634-35 (Bankr. N.D. Fla. 1990) (finding that debtors' failure to show that extension of time was substantially justified and failure to file within 90 days were cause for dismissal). The Debtors also failed to file an amended plan or to seek extensions for filing it. *See Novak v. DeRosa*, 934 F.2d 401, 404 (2d Cir 1991) (holding that delay was excessive and that dismissal was proper after debtors failed to file an amended plan, failed to seek extension, and failed to justify delay).

The court also found that the debtors' chapter 12 Plan was not feasible throughout this case. At the hearing on confirmation of the Plan, held on May 15, 2000, the Debtors themselves recognized that the Plan as proposed could not be confirmed because the projections for Plan payments were based on income received from the probate property that was in the hands of the receiver. The Debtors explained that the status of the probate property and the claims of the Creditors had to be litigated and resolved before the Debtors could determine whether a plan was feasible. Now, five years later, with the Trustee's Motion to Dismiss before the court, the status of the probate property still was pending and the Debtors' Plan remained unconfirmed and unconfirmable. Moreover, the Debtors never proposed an amended plan.

Finally, the court found that the case has had little activity for more than two years. Following the court's decision concerning the Creditors' claims against the Debtors and its reconsideration of those claims, issued by the court on March 21, 2003, the only activity in this case since that date has consisted of cash flow statements submitted by the Debtors and adjudications of requests for attorney compensation. It is therefore the considered opinion of this court that it has given the Debtors "extensive license in their quest to resolve their financial troubles with their creditors," including other family members. *In re Barger*, 233 B.R. at 85.

The court, having revisited its decision, finds that its granting of the Trustee's Motion to Dismiss was proper and appropriate. It has determined that the debtors failed in their burden of demonstrating the existence of manifest errors of fact or law. Their motion to alter or amend the court's Order of dismissal therefore is denied.

Conclusion

For the reasons presented above, the court finds that the Debtors did not establish clearly a manifest error of law or an intervening change in the controlling law; nor did they present newly discovered evidence. For that reason, the court denies the Debtors' motion to alter or amend the court's judgment of February 28, 2005. The Debtors' Motion to Reconsider Order Granting Trustee's Motion to Dismiss is denied.

SO ORDERED.

/s/ Harry C. Dees, Jr.
Harry C. Dees, Jr., Chief Judge
United States Bankruptcy Court